Supreme Court No. 84066-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

JEREMY ANDERSON,

Petitioner.

PETITION FOR REVIEW
COURT OF APPEALS, DIVISION II
NO. 38453-1

AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON

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INTRODUCTION

Amicus agrees that it was error to allow a SANE[1] NURSE to testify about what a detective told her about his conversation with a child before the child's SANE medical exam. This is because her testimony was double hearsay.

However, the error was harmless because the testimony was not about the victim of the charged crime. Instead, it was about a statement made by a victim in one of the three other sex offenses committed by the defendant and admitted pursuant to RCW 10.58.090.

Also, the error of admitting double hearsay was not raised at trial nor is it properly raised in the defendant's petition. In any event, it is not necessary to decide the general issue of admissibility of statements to a SANE NURSE in deciding the case.

STATEMENT OF THE CASE

The State charged the defendant with Child Molestation in the First Degree with M.A.E. as the named victim. (CP, 1-2).

M.A.E. testified at trial that a man came up to him at a park while riding a bicycle and asked him to go into the bathroom. The man told M.A.E. to get on the floor, and the man then rubbed his "hot dog" against

M.A.E.'s "hot dog." (RP 100-101). M.A.E. later said that he calls his penis a hot dog. M.A.E. identified the defendant as the man who rubbed his penis against M.A.E.'s penis. (RP 105). He also testified that it happened in the summer of 2007, and that their clothes were on. (RP 100, 108).

The court ruled that under RCW 9A.44.120, two witnesses could testify as to what M.A.E. told them about the abuse.

Lai-Wan Gunter had been M.A.E.'s counselor prior to the abuse. During a counseling session, M.A.E. told her that during the summer he had been playing in the park when a man asked him to go into the bathroom, asked him to lay on the floor, and then rubbed his private parts on M.A.E. (RP 112).

Detective Paul Campbell testified that he interviewed M.A.E. in November 2007. (RP 120). M.A.E. told Campbell about the man he saw at a park who asked him to go into the bathroom and then rubbed his private part on M.A.E.'s private part. (RP 121). M.A.E. picked the defendant out of a photo montage as the man who rubbed his private parts. (RP 122).

Dawn Minnich testified that on January 21, 2008, she evaluated the defendant for a sentencing in another case. (RP 160). During the

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[1] **Sexual Assault Nurse Examiner**

evaluation, she asked the defendant about any other prior sex offenses that may have occurred. The defendant said that at a park he asked a boy to go into the bathroom. While having their clothes on, they laid down and then they rubbed together. (RP 161).

Prior to trial, the State gave notice of intent to ask that the court allow evidence of three other sex offenses pursuant to RCW 10.58.090. (RP 68). This included the sex offense where SANE NURSE Nancy Young examined the child after getting a history from the detective. The other two sex offenses involved a conviction for a sex crime, and an uncharged offense where the defendant admitted to the act. (RP 91, 93).

In one incident, the defendant pled guilty to following an eight-year-old girl and nine-year old into a public restroom at a park, and told the eight-year-old girl that he was going to touch her vagina. When she screamed, the defendant fled on his bicycle. The court found that the similarities with the present case of approaching the victims at a public park, going inside a restroom, taking control of the situation, and using a bicycle were similar enough to allow admission. (RP 82-91).

In the other incident, the defendant admitted to a detective that he had touched the "dick" of a five-year-old boy on two other occasions. (RP 88).

The court admitted the other two prior offenses. (RP 91, 93). The court withheld decision on the admissibility of C.C.S.'s statements to Nurse Young saying that it would need testimony from Ms. Young as to the purpose of her taking the child's statement to determine if it was testimonial. (RP 92).

During the trial, the court took testimony from Ms. Young outside the presence of the jury. (RP 145). During that hearing, Ms. Young testified about her roles at the sexual assault clinic and the general practices at the clinic. This included a description of the team approach, that they are the medical portion of that piece, and that "We have the children come to the clinic, we take medical history, and then we perform a medical examination." (RP 147). Ms. Young also testified that they take a medical history versus a forensic interview.

At that point the State stated that it was evident from Ms. Young's testimony that the purpose of the examination was medical history, not a forensic interview. The court then asked defense counsel if it wanted to inquire, and defense counsel declined. (RP 148).

The court then entertained argument. The State argued that statements to Ms. Young would fall under the hearsay exception for medical diagnosis and treatment. (RP 149). The defense did not argue confrontation, but only objected because the child was taken to the clinic

because of alleged penetration by another individual, not because of anything the defendant did. Defense counsel concluded by arguing, "So I think it's misleading to the jury and it's the basis of my objection." (RP 149).

The trial court ruled that the statements were nontestimonial under the standards of *Crawford*. (RP 149-150). The trial court did not have the benefit of the actual statements or circumstances of the interview when it made its decision.

Nancy Young then testified in front of the jury. She first testified about her training and the general procedures followed when a child comes to the clinic for a medical examination. (RP 153-155).

Later, Ms. Young was asked about her contact with the child. Ms. Young answered:

> What I did with [C.C.S.] was to ask him - - I explained to him that I knew he had spoken with a detective about what happened. And was there anything additional or anything that he had forgotten to say to the detective. And he said no, not really. That he had lived down the block from them. He didn't mention specifically who he was. But he stated that he didn't have any pain that day that we saw him at the clinic. And that his body was fine.

(RP 155).

Unfortunately, Ms. Young also testified as to the history that she had been given by the detective. She testified that the history she had been given prior to her contact with C.C.S. was:

> The history was that [C.C.S.] had made a disclosure that an acquaintance, Jeremy Anderson, had touched his penis. And Jeremy had gotton on top of [C.C.S.] and rubbed his penis on – on [C.C.S.'s] penis. And that there was a concern that there possibly could have been more contact. But that was - - that was the history I had at the time.

(RP 155).

Defense counsel did not object to Young's testimony about what the detective told her, did not ask that it be struck, and did not cross examine Ms. Young. (RP 156).

The defendant was convicted of Child Molestation in the First Degree, and appealed to the Court of Appeals. (CP 9, 13-28).

The Court of Appeals found that "both briefs mischaracterize Young's testimony by quoting excerpts and describing them as C.C.S.'s statement to Young . . . But it is clear from the transcript that Young was merely recounting her knowledge of C.C.S.'s history prior to examining them." (Court of appeals Opinion No. 38453-1-II, footnote 2).

Later, the Court of Appeals found that Young's testimony was actually double hearsay, that Young testified to statements C.C.S. made to a detective. The Court further found that since the defendant did not object at trial and did not assign error to the double hearsay, the issue was not before them. (Court of Appeals Opinion No. 38453-1-II, footnote 4).

After noting the unraised and unbriefed double hearsay issue, the Court of Appeals addressed the Right to Confrontation issue. The Court

found that C.C.S.'s statements to Young were not testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). This was based on its findings that Young performed the sexual assault examination on C.C.S. as part of a "team approach" to investigations of child abuse, that Young testified that the exams are the medical portion of the team approach, not forensic interviews and that the information received from referrals is used to discern medical concerns and assist in taking the medical history of the victim. (Court of Appeals opinion No. 38453-1-II, 4).

ARGUMENT

The issue identified in this Court's acceptance of review cannot be addressed without addressing the double hearsay nature of Young's testimony.

ER 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. Similarly, each part of the combined statement should be nontestimonial for it to be admitted.

A recent case that addressed double hearsay and the right to confrontation is *State v. Alvarez-Abrego*, 154 Wn. App. 351, 225 P.3d 396 (2010).

There, the trial court admitted a four-year old's out-of-court statement to her mother that was repeated to the physician, who then testified to the four-year old's statement. The defendant argued that the admission was unconstitutional and evidentiary error under the Sixth Amendment's confrontation clause and ER 803(a)(4).

The Court found that the State did not prove that the child's statement to her mother was nontestimonial, and therefore, violated the confrontation clause. *Alvarez-Abrego*, 154 Wn. App at 364.

The Court also addressed the double hearsay aspect and discussed a prior double hearsay case under the medical diagnosis exception to the hearsay rule. *State v. Justiniano*, 48 Wn. App. 572, 740 P.2d 872 (1987). In that case, a four-year-old child told her mother what the defendant did with his finger and that it hurt. During the medical exam, the mother told the doctor about the child's statement to her. The court found that the mother's statements to the doctor by the mother were the equivalent of statements made by the child to the doctor. This was "because children of tender years are incapable of expressing their medical concern to physicians. *State v. Justiniano*, 48 Wn. App. at 578.

The Court in *Alvarez-Abrego* questioned whether any *Justiano* language concerning the double hearsay impact would constitute a holding, as the issue was not argued on appeal. It also found that even if it

was a holding, it would be distinguished because the child declarant in Alvarez-Abrego was not the victim. *Alvarez-Abrego*, 154 Wn. App. at 368.

There may be cases where double hearsay may be admissible under ER 803(a)(4) and be admissible as nontestimonial under *Crawford v. Washington*, but this would not be one of them.

This is because the original statement was originally made to Detective Heldreth. The State's trial memorandum in support of admissibility of evidence of other sex outlined this. It stated that Detective Heldreth conducted a forensic interview of C.C.S., and C.C.S. said that Jeremy Anderson had gotten on top of him and began rubbing each other's penises together. (CP 126). The memorandum then noted that C.C.S. was then seen by Nancy Young, and that he made "disclosures consistent with those made to Detective Heldreth during the forensic interview." (CP 126). However, at trial Young only testified that she told C.C.S. that she had spoken to the detective about what happened and asked if there was anything additional, and that C.C.S. said not really. (RP 155).

The trial prosecutor correctly did not call Detective Heldreth to testify at trial as to what C.C.S. told him during the forensic interview.

This was apparently in recognition that the C.C.S.'s statements to Detective Heldreth were inadmissible hearsay and testimonial statements.

In fact, while Crawford left for another day any effort to spell out a comprehensive definition of "testimonial," it did state, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *State v. Crawford*, 541 U.S. at 68.

Here, if Detective Heldreth could not testify as to what C.C.S. told him, it would be difficult to argue that those statements should be admitted simply because the detective gave those statements to Nurse Young prior to her exam.

ERROR WAS WAIVED

The Court of Appeals did not address the double hearsay issue because the defendant did not object at trial and did not assign error to the double hearsay. (Court of Appeals Opinion No. 38453-1-II, footnote 4).

On appeal, a party may not raise an objection not properly preserved at trial absent constitutional error. A strict approach is adopted because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

The present case is an excellent example of the need for the strict approach. If the defendant had objected to Nurse Young's testimony on the basis of confrontation after the double hearsay issue became apparent, the trial court here could have corrected its initial ruling, which was made after only the general testimony about the general role of a SANE nurse.

Similarly, the defendant does not assign error to the double hearsay issue in the present petition. In fact, in his supplemental brief, the defendant "respectfully disagrees" with the assessment by the Court of Appeals that Young's statements were double hearsay. (Supplemental Brief, 4).

A manifest error affecting a constitutional right may be raised despite a failure to properly preserve the issue at trial. *State v. Kronich*, 160 Wn.2d 893,161 P.3d 982 (2007). If the court finds that the present case involves such a manifest error and that the prtition's assignment of error includes the general issue of whether Nurse Young's testimony was testimonial under *Crawford*, then the Court should decide if the error was harmless.

HARMLESS ERROR

Any error in admitting Young's testimony was harmless. Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Watt*, 160 Wn.2d

626, 635, 160 P.3d 640 (2007). If the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt, the error is harmless. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

Here, the untainted evidence is so overwhelming. M.A.E., the victim, testified at trial. He described what happened in narrative answers to non-leading questions:

> Q Okay. So do you remember being at the park in the summer of 2007?
> A Yes.
> Q And did something happen there that you didn't like?
> A. Yes.
> Q What happened there that you didn't like?
> A A man came up to me on his bike and told me to come with him into the bathroom.
> Q And what happened when you went into the bathroom?
> A He told me to get on the floor.
> Q And what happened after he told you that?
> A He got on me.
> A And were you on your stomach, on your back or something else?
> A My back
> Q And when you say he got on top of you, did he stand over you, lay on top of you or something else?
> A Lay on top of me.
> Q Did he do anything when he was laying on top of you?
> A He was rubbing against me.
> Q And what part of your body was he rubbing against?
> A My hot dog.
> Q And when – is that – is that a term that you use for a body part?
> A Yep.
> Q And if I – is – your hot dog what you would call your penis?
> A Yes.
> Q And what was he rubbing your hot dog with?

A His hot dog.
(RP 100-101).

Lai-Wan Gunter's testimony about M.A.E.'s disclosure to her during a counseling session was very credible. Ms. Gunter was counseling M.A.E. on other matters when M.A.E. brought up the defendant's touching him in the park bathroom. (RP 111-112). His narrative statements to Ms. Gunter were consistent with his testimony.

Likewise, Detective Paul Campbell testified about M.A.E.'s disclosure to him, and this was also consistent with M.A.E.'s testimony. (RP 121).

The defendant also essentially confessed to the sexual assault against M.A.E. On January 21, 2008, he was asked about any other sex offenses that may have occurred. The defendant said that at a park he asked a boy to go into the bathroom. While having their clothes on, they laid down and then they rubbed together. (RP 161).

Finally, the jury heard of two other sex offenses committed by the defendant that were similar to the present case. The defendant did not assign error to admission of either act.

SANE NURSE

The defendant cites cases from other jurisdictions for reaching the conclusion that statements made in the course of sexual abuse examinations are testimonial. (Defendant's Supplemental Brief, 8).

That conclusion is contrary to the case law in Washington. In *State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005), the Court held that the child's victim's statements to a treating physician were not testimonial where it was clear that the doctor's questions were part of her efforts to provide proper treatment. In *State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005), the Court held that the victim's statements to a treating doctor were not testimonial, because the purpose of the examination was for medical treatment of the victim's significant injuries. In *State v. Sandoval*, 137 Wn. App. 532, 538, 154 P.3d 271 (2007), the Court held that the victim's statements to emergency room staff were not testimonial, as they were made for diagnosis and treatment purposes.

Also, the out-of-state cases cited by the defendant did not involve statements to a doctor or nurse during a medical exam.

AMICUS is aware that cases involving SANE nurses can be distinguished from the current case law on the medical diagnosis treatment exception.

The only Washington case that specifically addresses testimony by SANE nurse is *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007). That Court upheld the admission of statements under the medical diagnosis exception because the medical examination was for "a combination" of purposes, medical as well as forensic. However, *State v. Williams* is not good authority on the issue of confrontation, as the patient herself testified at trial. *Id.* at 746.

There is a split of authority in other jurisdictions as to whether statements made during a SANE exam are testimonial.

However, the best rule is set forth in *State v. Mendez*, 148 N.M 761, 242 P.3d 328 (2010). There, the New Mexico Supreme Court reversed a per se rule in New Mexico that statements to SANE nurses were testimonial and therefore not admissible at trial. The Court noted that SANE nurses have a dual role, the provision of medical care and the collection and preservation of evidence. The Court concluded that:

> It would make our job far easier simply to exclude all statements made during SANE examinations. We would do so, however, at the substantial risk of excluding statements that are otherwise trustworthy, vital to the prosecution, and fair to the accused. Our hearsay rule was not intended to create such an injustice. Our courts must once again shoulder the heavy responsibility of sifting through statements, piece by piece, making individual decisions on each one.

State v. Mendez, 148 N.M. 761, 242 P.3d at 341.

The *Mendez* Court then ruled that on remand the trial court would need to treat the trustworthiness of each of the patient's statements, taking into consideration the patient's help-seeking motivation and the pertinence of such statements to medical diagnosis or treatment.

Other cases that have upheld testimony by SANE nurses as to what patients told them in a dual-purpose exam are *State v. Stahl*, 111 Ohio St.3d 186, 189, 855 N.E.2d 834 (2006), *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010), *State v. Martin* M, 115 Conn.App. 166, 971 A.2d 828 (2009), *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004), and *Webster v. State*, 151 Md.App. 527, 827 A.2d 910 (2003).

Cases that have rejected testimony from SANE nurses have done so based on facts specific to the facts or jurisdiction. For example in *State v. Miller*, 42 Kan. App.2d 12, 208 P.3d 774 (2009), the Court found that a patient's statements to a SANE nurse were testimonial. However, that was based on the Court's finding that at no time did the nurse testify that the primary purpose of her examination was for medical diagnosis or treatment. Instead, the questions were asked because she needed to know where to swab and collect evidence. In. *Hartsfield v. Kentucky*, 277 S.W.3d. 239 (2009), the Court focused on statutes and protocols for SANE nurses. This included the requirement that SANE nurses act upon request of a peace officer and a finding that SANE nurses elicit evidence of post

offenses with an eye toward future criminal prosecutions. The Court found that the SANE nurse interview was the functional equivalent of police questioning. It also included a finding that the purpose of the interview was not to provide help for an ongoing emergency, but rather for disclosure of information of what happened in the past.

The present case does not have the detailed record that was before the Court in *State v. Miller*, or *Hartsfield v. Kentucky*. The lack of detailed record about protocol and roles of SANE nurses would preclude any general rule from this Court as to admissibility of testimony from SANE nurse. This is especially true since there is no record of any statewide law or protocol. The protocol and use of SANE nurses may vary from county to county. Therefore, the holding on this case should be limited to the specific facts of the present case.

CONCLUSION

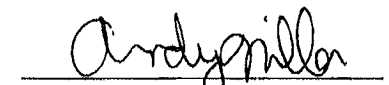
The defendant did not object to Nurse Young's double hearsay at trial, so any error was waived.

If it was not waived, Nurse Young's testimony as to what Detective Heldreth told her about his interview with C.C.S. was error.

However, the error was harmless and the conviction should be affirmed. In any event, the decision on the case can be reached on the

unique facts of this case without deciding general issues of admissibility of testimony by SANE nurses.

RESPECTFULLY SUBMITTED this 15th day of February 2011.

By: 

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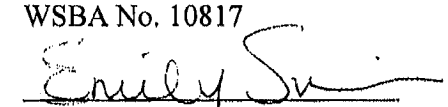

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